Supreme Court, U.S.
FILED

98 944 DEC 2 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

The Honorable HELEN CHENOWETH, the Honorable BOB SCHAFFER, the Honorable DON YOUNG, and the Honorable RICHARD W. POMBO, all in their official capacities,

Petitioners,

v.

WILLIAM J. CLINTON, President of the United States, GEORGE T. FRAMPTON, JR., Acting Chair of the Council on Environmental Quality, individually and in their official capacities, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM PERRY PENDLEY*
**Counsel of Record*
ROGER JACQUES KOTHARY
Mountain States Legal Foundation
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

74BP

QUESTIONS PRESENTED

Whether Members of Congress have standing to challenge an unconstitutional action by the President of the United States that usurps constitutionally prescribed lawmaking powers assigned to Congress by Article I of the U.S. Constitution:

1. When the ability of those Members to exercise their lawmaking powers was "nullified" in the manner of *Coleman v. Miller*, 307 U.S. 433 (1939)?

2. When, unlike Members of Congress in *Raines v. Byrd*, 117 S.Ct. 2312 (1997), those Members were denied the ability to exercise their lawmaking powers in the manner prescribed by the Constitution?

3. When the standing of those Members to challenge such an unconstitutional action, as repeatedly recognized by the U.S. Court of Appeals for the District of Columbia Circuit, was not overturned by *Raines v. Byrd*?

LIST OF PARTIES

The Honorable Helen Chenoweth, the Honorable Bob Schaffer, the Honorable Don Young, and the Honorable Richard W. Pombo are all duly elected Members of the United States House of Representatives, who, in their official capacities as Members of Congress, were Plaintiffs before the United States District Court for the District of Columbia and Appellants before the United States Court of Appeals for the District of Columbia Circuit.

William J. Clinton, President of the United States, and Kathleen A. McGinty, Chair of the Council on Environmental Quality, individually and in their official capacities, were Defendants before the United States District Court for the District of Columbia and Appellees before the United States Court of Appeals for the District of Columbia Circuit. Ms. McGinty has been replaced as Chair of the Council on Environmental Quality by George T. Frampton, Jr. The United States of America was also a party below as both Defendant and Appellee.

STATEMENT OF RELATED CASES

There is no other related case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

STATEMENT OF RELATED CASES iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTES AND REGULATIONS INVOLVED 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 6

REASONS FOR GRANTING THE WRIT 13

I. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE ON WHICH THIS COURT HAS NEVER RULED, THAT IS, THE ABILITY OF MEMBERS OF CONGRESS TO ENSURE THE SEPARATION OF POWERS SET FORTH IN THE CONSTITUTION 13

A. Because Concentration Of Power In The Hands Of A Single Branch Is A Threat To Liberty, It Is A Matter Of Exceptional Importance That Must Be Addressed By This Court 13

B. This Exceptionally Important Matter Has Never Been Addressed By This Court, Contrary To The Holding Of The District Of Columbia Circuit Court 15

TABLE OF CONTENTS – Continued

Page

C. With Regard To This Exceptionally Important Matter, The Decision Of The District Of Columbia Circuit Court Is In True, Direct, Intolerable, And Irreconcilable Conflict With The Holdings Of This Court 17

1. Contrary to the holding of the District of Columbia Circuit, the facts of this case differ markedly from *Raines v. Byrd* 17

2. An application of *Raines v. Byrd* to this case would have resulted in standing for the Members 18

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT AND DECISIONS OF THIS COURT REGARDING THE ABILITY OF ELECTED REPRESENTATIVES, WHOSE VOTES HAVE BEEN NULLIFIED, TO HAVE STANDING TO CHALLENGE SUCH VOTE NULLIFICATION 22

A. The District Of Columbia Circuit Misstated And Misunderstood The Factual Analysis By This Court 22

B. The Political Resolution Analysis Applied By The District Of Columbia Circuit Is In Conflict With The Analysis Applied By This Court 24

III. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT AND DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS REGARDING THE ABILITY OF COURTS TO OVERTURN BINDING CASE LAW BY IMPLICATION 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Sierra Club, 442 U.S. 347 (1979) 10

Bowsher v. Synar, 478 U.S. 714 (1986) 15

Byrd v. Raines, 956 F.Supp. 25 (D.D.C. 1997) 16

Chambers v. Thompson, 150 F.3d 1324 (11th Cir. 1998) 26

Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999) 1, 6, 16, 19, 20, 24

Chenoweth v. Clinton, 997 F.Supp. 36 (D.D.C. 1998) 1, 5, 6, 23

Clinton v. City of New York, 524 U.S. 417, 118 S.Ct. 2091 (1998) 13, 14

Coleman v. Miller, 307 U.S. 433 (1939) ..... *passim*

Engineering Contractors Ass'n of S. Fla. Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997) 26

Gregory v. Ashcroft, 501 U.S. 452 (1991) 13

Guevera v. Maritime Overseas Corp., 34 F.3d 1279 (5th Cir. 1994) (*per curiam*) 26

Hague v. Committee for Indus. Org., 101 F.2d 774 (3rd Cir. 1939) 27

INS v. Chadha, 462 U.S. 919 (1983) 15

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) 19, 21, 23

Kestler v. Board of Trustees of N. Carolina Local Gov't Employees' Retirement System, 48 F.3d 800 (4th Cir. 1995) 26

TABLE OF AUTHORITIES – Continued

Page

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 10

Marbury v. Madison, 5 U.S. 137 (1803) 13

Metropolitan Wash. Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 14

Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984)..... 15, 16, 19, 20, 23, 24

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)..... 15

Printz v. U.S., 521 U.S. 898 (1997).....13, 14

Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312 (1997)...*passim*

U.S. v. Midwest Oil Co., 236 U.S. 459 (1915) 11

Warth v. Seldin, 422 U.S. 490 (1975) 6

CONSTITUTION

U.S. Constitution, Art. I, § 1.....1, 11

U.S. Constitution, Art. I, § 7 (Separation of Powers Doctrine)..... 1

U.S. Constitution, Art. I, § 8, cl. 3 (Commerce Clause).....2, 11

U.S. Constitution, Art. I, § 9, cl. 7 (Spending Clause).....2, 11

U.S. Constitution, Art. II, § 1 .....1, 11

U.S. Constitution, Art. III, § 2 .....1, 11

U.S. Constitution, Art. IV, § 3, cl. 2 (Property Clause).....2, 11

U.S. Constitution, Tenth Amendment..... 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

16 U.S.C. § 1271 et seq. 10, 12

16 U.S.C. § 1273 ..... 3, 10

28 U.S.C. § 1254(1) 1, 3

31 U.S.C. § 1301(a) 3, 4, 11

42 U.S.C. § 4321, et seq. 12

42 U.S.C. § 4331(b) 3, 9, 10

43 U.S.C. § 1701 et seq. 10, 12

43 U.S.C. § 1701(a) 3, 4, 10

43 U.S.C. § 1714(a) 3, 4, 10

90 Stat. 2744, 2792 (1976), Pub. L. No. 94-579, § 704(a) 11

OTHER AUTHORITIES

Fed. R. Civ. P. 12(b) 5

62 Fed. Reg. 27,253 (May 19, 1997) 7, 8

62 Fed. Reg. 48,445 (September 15, 1997) 9

62 Fed. Reg. 48,860 (September 17, 1997) 9

OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the District of Columbia Circuit, *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) *reh'g en banc denied* (September 3, 1999), issued July 2, 1999, upholding the decision of the United States District Court for the District of Columbia, which Court of Appeals opinion appears at pages App. 1 to App. 15 of the Appendix. The opinion and order of the United States District Court for the District of Columbia, *Chenoweth v. Clinton*, 997 F.Supp. 36 (D.D.C. 1998), issued March 2, 1998, appears at pages App. 16 to App. 28 of the Appendix.

JURISDICTION

Petitioners seek review of the opinion and judgment issued by the United States Court of Appeals for the District of Columbia Circuit on July 2, 1999. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Constitution are involved in this Petition for *Writ* of *Certiorari*: Article I, Section 1, regarding the "legislative Powers" of Congress; Article II, Section 1, regarding the "executive Power" of the President; Article III, Section 2, regarding "cases" and "controversies;" Article I, Section 7 (Separation of Powers

Doctrine); Article I, Section 8, Clause 3 (Commerce Clause); Article I, Section 9, Clause 7 (Spending Clause); Article IV, Section 3, Clause 2 (Property Clause); and the Tenth Amendment.

Article I of the United States Constitution, which provides, in pertinent part:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.
>
> * * *
>
> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had

signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

STATUTES AND REGULATIONS INVOLVED

The following federal statutes are involved in this Petition for *Writ of Certiorari*: 16 U.S.C. § 1273 of the Wild and Scenic Rivers Act ("WSRA"); 28 U.S.C. § 1254(1); 31 U.S.C. § 1301(a) of the Anti-Deficiency Act; 42 U.S.C. § 4331(b) of the National Environmental Policy Act of 1969 ("NEPA"); and 43 U.S.C. §§ 1701(a) and 1714(a) of the Federal Land Policy and Management Act of 1976 ("FLPMA").

16 U.S.C. § 1273 provides, in pertinent part:

The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow . . .

31 U.S.C. § 1301(a) provides, in pertinent part:

> Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

43 U.S.C. § 1701(a) provides, in pertinent part:

> The Congress declares that it is the policy of the United States that the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action.

43 U.S.C. § 1714(a) provides, in pertinent part:

> On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

STATEMENT OF THE CASE

On December 10, 1997, Members of Congress Chenoweth, Schaffer, Young, and Pombo ("the Members") filed their complaint in the U.S. District Court for the District of Columbia, charging that President Clinton had no authority to issue his September 17, 1997, Executive Order (E.O. 13061) establishing an American Heritage

Rivers Initiative ("AHRI"). App. 30 to App. 38. On December 10, 1997, pursuant to Executive Order 13061, President Clinton designated so-called "Heritage Rivers" throughout the United States.

On January 13, 1998, the Members filed a motion for a preliminary injunction to enjoin President Clinton and others from continuing to implement the AHRI. On January 26, 1998, President Clinton filed a Federal Rules of Civil Procedure 12(b) motion to dismiss the complaint, asserting that the Members lacked standing.

On March 2, 1998, the U.S. District Court for the District of Columbia granted President Clinton's motion to dismiss, holding that the Members lacked standing because their injury was "unrelated to passing a specific piece of legislation" and was otherwise lacking in "concreteness or specificity." *Chenoweth v. Clinton*, 997 F.Supp. at 41. In issuing its ruling, the District Court assumed that President Clinton's actions regarding the AHRI "unconstitutionally violated the Separation of Powers doctrine and the other constitutional provisions and statutes cited by [the Members]." *Chenoweth v. Clinton*, 997 F.Supp. at 37.

On March 23, 1998, the Members timely filed their appeal to the U.S. Court of Appeals for the District of Columbia. After briefings, oral arguments were held on January 29, 1999.

On July 2, 1999, the District of Columbia Circuit affirmed the District Court's decision, holding "the portions of our legislative standing cases upon which [the Members] rely are untenable in the light of [the U.S. Supreme Court's decision in] *Raines* [*v. Byrd*, 521 U.S. 811,

117 S.Ct. 2312 (1997)]." *Chenoweth v. Clinton*, 181 F.3d at 115. Concluded the District of Columbia Circuit: "[The Members'] claim to standing on the ground that the President's implementation of the AHRI without congressional consent injured them by diluting their authority as Members of Congress is indistinguishable from the claim to standing the Supreme Court rejected in *Raines*." *Id.* at 116.[1]

On August 16, 1999, the Members filed a petition for rehearing *en banc*, which was denied by the U.S. Court of Appeals for the District of Columbia Circuit *per curiam* on September 3, 1999. App. 29.

This Petition for *Writ of Certiorari* follows.

STATEMENT OF FACTS

During his State of the Union address before a joint session of Congress on February 4, 1997, President Clinton announced his intention to create an AHRI whereby he would designate selected rivers as "Heritage Rivers"

[1] Like the District Court, the Circuit Court, in considering President Clinton's motion to dismiss, had to "assume the validity of the [Members'] claim and construe the complaint in favor of the complaining parties." *Chenoweth v. Clinton*, 997 F.Supp. at 37 (*citing Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Thus, the Circuit Court assumed that President Clinton's AHRI Executive Order was unconstitutional and illegal.

in order to "help communities alongside them revitalize their waterfronts and clean up pollution."[2]

President Clinton subsequently convened an interagency task force to develop the AHRI[3] and later formed the Interagency Committee on American Heritage Rivers ("Committee"), which was charged with making program recommendations for the President's approval within 90 days. The Committee's first organizational meeting was held on February 12, 1997.[4] In that meeting, the Committee established a working group responsible for preparing materials and making recommendations for review by the Committee.[5] The Committee held various regional

---

[2] CEQ Memorandum To Distribution from Karen Hobbs concerning regional meetings.

[3] American Heritage Rivers Initiative; Proposal With Request for Comments, 62 Fed. Reg. 27,253 (1997). Participating agencies include: the Departments of Agriculture, Commerce, Defense, Energy, Interior, Justice, and Housing and Urban Development; the Environmental Protection Agency; the Advisory Council on Historic Preservation; the Army Corps of Engineers; and the National Endowment for the Humanities. This task force was charged with integrating the environmental, historic, and economic programs among several federal agencies.

[4] CEQ Interagency Committee On American Heritage Rivers Memorandum, dated February 18, 1997, from Wesley Warren, Ray Clark, and Diane Regas to members of the Committee.

[5] Various lists of the working group have been issued, but the most inclusive appears in the CEQ Memorandum For Distribution, dated May 6, 1997, from Karen Hobbs to members of the working group.

public meetings concerning the proposed initiative.[6] The regional meetings focused on obtaining feedback for the overall design of the program and criteria to be used in designating "Heritage Rivers."[7]

On May 19, 1997, the Council on Environmental Quality ("CEQ") published a notice concerning the proposed initiative in the Federal Register, which notice provided a 21-day comment period.[8] In response to the requests of various individuals, including the Members, and groups, the comment period, originally scheduled to end June 9, 1997, was extended until August 20, 1997.[9]

On September 11, 1997, President Clinton signed Executive Order 13061 creating the AHRI "to protect and

---

[6] American Heritage Rivers Initiative; Proposal With Request for Comments, 62 Fed. Reg. 27,253 (1997).

[7] CEQ Memorandum To Distribution from Karen Hobbs concerning regional meetings [with attachments]; NPS Fax Transmission, dated April 25, 1997, from Alan Ragins to Karen Hobbs; American Heritage Rivers Initiative Program, Asheville Focus Group, dated May 1, 1997; American Heritage Rivers Initiative Workshop, Atlanta, Georgia, dated April 28, 1997; American Heritage Rivers, summary of comments given at stakeholders meeting in Philadelphia, Pennsylvania, dated April 25, 1997; and American Heritage Rivers Meeting, items highlighted by Valerie Chambers at San Francisco, California, dated April 1997.

[8] American Heritage Rivers Initiative; Proposal With Request for Comments, 62 Fed. Reg. 27,253 (1997) (proposed May 19, 1997).

[9] The Chairs of the House Committees on Resources and Agriculture and the Chairs of several Subcommittees of the House Committee on Resources sent a letter to Kathleen McGinty on June 4, 1997.

restore rivers and their adjacent communities." 64 Fed. Reg. 48,445 (1997). App. 30. Executive Order 13061 formally established the Committee with two co-chairs: the Chair of the CEQ serving as permanent co-chair, the other co-chair rotating among the heads, or their designees, of the participating agencies.[10] Executive Order 13061 also designated the CEQ as the "Executive Agent" for the Committee.

On September 17, 1997, CEQ Chair Kathleen McGinty published a notice describing the AHRI in 62 Fed. Reg. 48,860 (1997). According to that notice, under the AHRI, "the President will designate rivers that meet certain criteria as 'American Heritage Rivers,' " and "executive agencies . . . shall coordinate Federal plans, functions, programs, and resources to preserve, protect, and restore rivers and their associated resources important to our history, culture, and natural heritage." *Id.*

As authority for Executive Order 13061, President Clinton cited to Section 101(b) of the National Environmental Policy Act. 42 U.S.C. § 4331(b). Section 101 of NEPA contains a broad statement of the environmental policies to be achieved by the action-forcing procedures required by NEPA.[11] Section 101(b) provides only that the

---

[10] The heads of the participating agencies include the Secretaries of Agriculture, Commerce, Defense, Energy, Interior, Housing and Urban Development and Transportation; the Attorney General; the Administrator of the Environmental Protection Agency; and the Chairs of the National Endowment of the Arts and the National Endowment for the Humanities.

[11] NEPA contains "a set of 'action-forcing' procedures" to ensure that the broad policy goals of Section 101 are "infused

action-forcing procedural requirements of NEPA are intended to ensure that federal agencies "use all practicable means to improve and coordinate Federal plans, functions, programs, and resources . . . " 42 U.S.C. § 4331(b).

The Members are all duly elected Members of Congress and all serve on the Resources Committee of the U.S. House of Representatives, which committee has jurisdiction over the subject matters implicated by the AHRI. Specifically, the Resources Committee has jurisdiction over the Wild and Scenic Rivers Act,[12] 16 U.S.C. § 1271 *et seq.*, the Federal Land Policy and Management Act of 1976,[13] 43 U.S.C. § 1701 *et seq.*, and other federal

---

into *the ongoing programs and actions* of the Federal Government." *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Kleppe v. Sierra Club*, 427 U.S. 390, 409, and n. 18 (1976) (emphasis added). Neither NEPA nor Section 101 contains substantive authority for the adoption of new programs by the Federal Government.

[12] Under the WSRA, Congress may designate rivers as "wild," "scenic," "recreational," or a combination thereof. There is no authority in the Act for the President or any other officials to make such a designation or to designate a river as a "heritage river." 16 U.S.C. § 1273.

[13] In 1976, Congress passed the Federal Land Policy and Management Act ("FLPMA"). One of the purposes of FLPMA was to establish a specific procedure for federal land withdrawals by the Executive Branch. Congress used FLPMA to reassert its constitutional control over federal lands by limiting the delegated authority of the Executive Branch to withdraw federal lands. "The Congress declares that it is the policy of the United States that the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that *Congress delineate the extent to which the Executive may withdraw lands without legislative action.*" 43 U.S.C. § 1701(a) (emphasis added); *see also,*

statutes by which Congress has exercised its Commerce Clause and Property Clause authority to regulate interstate commerce and property belonging to the United States.

The Members contend that the President may not adopt a new federal program by means of an Executive Order because Congress has not delegated the requisite authority to do so to the President. The Members further contend that, because Congress has not delegated that authority to the President, his signing of Executive Order 13061 violates numerous provisions of the Constitution, including: Article I, Section 1, Article II, Section 1, and Article III, Section 2; as well as the Separation of Powers Doctrine (Art. I, § 7), the Commerce Clause (Art. I, § 8, cl. 3), the Spending Clause (Art. I, § 9, cl. 7), the Property Clause (Art. IV, § 3, cl. 2), and the Tenth Amendment. The Members also contend that, by his signing of Executive Order 13061, the President violated numerous federal statutes, including: the Anti-Deficiency Act, 31 U.S.C. § 1301, *et seq.*; the Federal Land Policy And Management

---

43 U.S.C. § 1714(a). Congress also utilized FLPMA to eliminate any implied Presidential withdrawal authority or any Presidential withdrawal authority ostensibly as a result of any alleged "acquiescence" by Congress. "Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459 [1915]) and the following statutes and parts of statutes are repealed." FLPMA, Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792 (1976).

Act of 1976, 43 U.S.C. § 1701, *et seq.*; the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.*; and the Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.*

The Members contend that, because only Congress has authority to enact an AHRI and because the AHRI was implemented by the President without congressional action or approval, the Members were denied the ability to exercise their lawmaking powers in the manner prescribed in the Constitution. In addition, the Members contend that their past votes, as to the specific manner in which federal funds are to be expended and as to other legislation, including, for example, the Wild and Scenic Rivers Act, have been nullified. Furthermore, the Members contend that their lawmaking powers were nullified by the President's implementation of the AHRI without the adoption of legislation by Congress. Finally, the Members contend that their inability to vote prior to the President's implementation of the AHRI deprived them of their constitutionally prescribed lawmaking powers: to exercise their duties to debate and vote on legislation; to conduct oversight within the jurisdiction of their Committee and Subcommittees; and to regulate commerce, manage and regulate federal lands, and authorize and appropriate federal expenditures.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE ON WHICH THIS COURT HAS NEVER RULED, THAT IS, THE ABILITY OF MEMBERS OF CONGRESS TO ENSURE THE SEPARATION OF POWERS SET FORTH IN THE CONSTITUTION.

A. Because Concentration Of Power In The Hands Of A Single Branch Is A Threat To Liberty, It Is A Matter Of Exceptional Importance That Must Be Addressed By This Court.

Ever since this Court ruled in *Marbury v. Madison*, 5 U.S. 137 (1803), federal courts have acted to ensure that the Constitution remains "the supreme law of the land." *Id.* at 180. Courts have done so, not to protect the privileges of the branches of government, but to "reduce the risk of tyranny and abuse." *Printz v. U.S.*, 521 U.S. 898, 921 (1997) (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

As a result, this Court has held "that a law repugnant to the [C]onstitution is void and that courts, as well as other departments, are bound by that instrument." *Marbury v. Madison*, 5 U.S. at 180. As Justice Kennedy made clear in his concurrence in *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091 (1998), "[a]bdication of responsibility is not part of the constitutional design." *Id.* at 2110. Justice Kennedy further stated:

> Separation of powers was designed to implement a fundamental insight; concentration of power in the hands of a single branch is a threat to liberty.

* * *

> [The Framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term . . . The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not to possess the power to shape their destiny without a sufficient check from the other two.

Id. at 2109.

Because "[l]iberty is always at stake when one or more of the branches [of government] seek to transgress the separation of powers," *Clinton v. City of New York*, 118 S.Ct. at 2109, the District of Columbia Circuit's opinion permitting the President to enact a law contrary to the process set forth in the Constitution jeopardizes those liberties. As a result, the District of Columbia Circuit's holding is in true, direct, intolerable, and irreconcilable conflict with the holdings of this Court in *City of New York* and numerous other decisions.

The framework of the Constitution, including the Separation of Powers Doctrine, exists to protect the liberties guaranteed by the Constitution. *Printz v. U.S.*, 521 U.S. at 921. As a result, this Court has held that the Constitution's structure requires a stability that transcends the efficiency, expediency, convenience, and usefulness of the moment. *See Metropolitan Wash. Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-277 (1991) (the Board of Review composed of congressmen and having veto power over decisions by local authorities impermissibly encroached upon

executive powers in violation of the Separation of Powers Doctrine); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (the powers vested in the Comptroller General under the Balanced Budget and Emergency Deficit Control Act violated the Constitution's command that Congress play no direct role in the execution of the laws); *INS v. Chadha*, 462 U.S. 919, 944-45 (1983) (the section of Immigration and Nationality Act authorizing one House of Congress, by resolution, to invalidate an Executive Branch decision was unconstitutional because action by that House was essentially legislative and thus subject to the constitutional requirements of passage by a majority of both Houses and presentment to the President); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73-74 (1982) (the Bankruptcy Reform Act's broad grant of jurisdiction to bankruptcy judges regarding certain civil proceedings violated Article III of the Constitution).

Because this case presents a matter of exceptional constitutional importance involving, as it does, the manner in which liberty is guaranteed to the citizens of this country, and because the decision of the District of Columbia Circuit is in intolerable conflict with the holdings of this Court, this Court should grant the Petition.

B. This Exceptionally Important Matter Has Never Been Addressed By This Court, Contrary To The Holding Of The District Of Columbia Circuit Court.

The District of Columbia Circuit recognized that if it were to apply the holding of the District of Columbia Circuit in *Moore v. United States House of Representatives*,

733 F.2d 936 (D.C. Cir. 1984), "this court presumably would have found [the Members'] injury sufficient to satisfy the standing requirements." *Chenoweth v. Clinton*, 181 F.3d at 116. However, held the Circuit Court, "after *Raines*, [ ] we cannot." *Id.* Thus, the Circuit concluded that in *Raines* this Court overturned the District of Columbia Circuit's holdings regarding congressional standing.

But this Court expressed no opinion as to the constitutionality of that line of cases, noting only that the District of Columbia Circuit "has repeatedly recognized Members' standing to challenge measures that affect their constitutionally prescribed lawmaking powers." *Raines v. Byrd*, 117 S.Ct. at 2316 (*quoting Byrd v. Raines*, 956 F.Supp. 25, 30 (D.D.C. 1997)). Thereafter, this Court was silent as to that line of cases, turning its attention to its earlier decisions. "We have never had occasion to rule on the question of legislative standing presented here." *Raines v. Byrd*, 117 S.Ct. at 2318. Thus, given the opportunity to address the District of Columbia Circuit's decisions regarding congressional standing, this Court did not address those decisions. Instead, this Court analyzed "[t]he one case in which we have upheld standing for legislators [*Coleman v. Miller*, 307 U.S. 433 (1939)]."

Clearly, in deciding *Raines*, this Court did not address, let alone overturn, the host of decisions by the District of Columbia Circuit regarding the standing of Members to challenge measures that affect their constitutionally prescribed lawmaking powers. In fact, it appears that this Court specifically declined to address those cases, let alone overturn them.

Because this case presents a matter of exceptional constitutional importance and because this case presents a matter never addressed by this Court, this Court should grant the Petition.

C. With Regard To This Exceptionally Important Matter, The Decision Of The District Of Columbia Circuit Court Is In True, Direct, Intolerable, And Irreconcilable Conflict With The Holdings Of This Court.

1. Contrary to the holding of the District of Columbia Circuit, the facts of this case differ markedly from *Raines v. Byrd*.

As the factual analysis engaged in by this Court in *Raines v. Byrd* demonstrates conclusively, the injury in this case is unlike the injury in *Raines*. In *Raines*, this Court set forth why the *Raines* plaintiffs were unlike the *Coleman* plaintiffs: "In the vote on the Line Item Veto Act, [the *Raines* plaintiffs'] votes were given full effect. They simply lost that vote." 117 S.Ct. at 2320. As to the possibility that the Line Item Veto Act would result in future vote nullification, the Court rejected that contention after finding:

> a majority of Senators and Congressman [sic] can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of Senators and Congressman [sic] can vote to repeal the Act, or to exempt a given

> appropriations bill . . . from the Act; again, the Act has no effect on this process.[14]

Id.

The facts of this case are unlike those presented in *Raines* and like those presented in *Coleman*. In the instant case, the Members were not allowed to vote for or against enactment of the AHRI prior to President Clinton's unilateral enactment of the AHRI by means of Executive Order 13061. Furthermore, an attempt to "repeal" the President's unconstitutional adoption of the AHRI would not be by a vote of "a majority of Senators and Congressm[e]n," as the *Raines* Court noted is enough to "pass or reject" bills, but by a two-thirds vote due to the anticipated presidential veto. Thus, these facts demonstrate that this case is factually analogous to *Coleman* and totally dissimilar from *Raines*.

2. An application of *Raines v. Byrd* to this case would have resulted in standing for the Members.

The District of Columbia Circuit concluded that the instant case involves the "internal affairs of the legislative

---

[14] Mistakenly, the District of Columbia Circuit views the injury asserted by the members in *Raines* as like the one asserted by the Members here. Yet, as the *Raines* quote in text makes clear, and as the District of Columbia Circuit admits, the *Raines* members asserted that their injury was the impact of the Line Item Veto Act on the effectiveness of future votes. Dissimilarly, the injury to the Members here involves, not the effectiveness of some future vote, but the loss of the effectiveness of their votes to enact the AHRI and the loss of the effectiveness of their past votes regarding the WSRA.

branch," *Chenoweth v. Clinton*, 181 F.3d at 116 (*quoting Moore v. United States House of Representatives*, 733 F.2d at 956), and thus, whether by use of the Circuit's erroneous application of the standing analysis of *Raines* or by application of the equitable discretion analysis of *Moore*, the Members may not be heard.[15] *Chenoweth v. Clinton*, 181 F.3d at 115-117. As to the latter basis, the District of Columbia Circuit is in error because, unlike *Moore*, this case does not involve the "internal affairs of the legislative branch."

Moore involved adoption of legislation that, under the Origination Clause of the Constitution, should have originated in the House of Representatives but did not. Thus *Moore* involved the "internal affairs" of Congress because Moore's colleagues willingly enacted revenue-raising legislation that did not originate in the House. *Moore v. United States House of Representatives*, 733 F.2d at 948-49, 956.

However, this case involves, not the "internal affairs" of Congress, but the constitutional relationship between the Executive and Legislative Branches, that is, the very nature of the Separation of Powers Doctrine. For here, despite the requirement of the Constitution that only

---

[15] The Circuit's assertion that the Members ask that half of *Moore* be ignored is erroneous. The "equitable discretion" portion of *Moore* is inapplicable to the instant case because this case does not involve "the internal affairs of the legislative branch," but instead, like *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), involves a political dispute between the Executive and Legislative Branches over the "process by which a bill becomes law." *Moore v. United States House of Representatives*, 733 F.2d at 951.

Congress may enact laws, President Clinton enacted the AHRI unilaterally by Executive Order 13061. By virtue of this fact alone, this case is not about the "internal affairs" of Congress.

The District of Columbia Circuit attempts to remedy this factual dissimilarity with *Moore* by noting that "Congress could terminate the AHRI were a sufficient number in each House so inclined." *Chenoweth v. Clinton*, 181 F.3d at 116. Thus, in the Circuit's view, "[b]ecause the parties' dispute is therefore fully susceptible to political resolution," this case involves the "internal affairs" of Congress. *Id.* The Circuit's analysis of the Separation of Powers Doctrine fails for two reasons.

First, the Constitution sets forth the process by which a bill becomes law, a process that does not involve presidential adoption of legislation subject to rejection or repeal by Congress. Thus, the Circuit labels the "political resolution" it offers the Members as part of the "internal affairs" of Congress only by ignoring the process set forth in the Constitution and the Circuit's duty to protect that constitutional process.[16]

Second, in the face of the expected veto by President Clinton of a "repeal" by Congress of his enactment of the

---

[16] From a practical standpoint, because President Clinton ostensibly draws his authority, not from any specific grant of authority, but from the broad, generic, precatory language of NEPA, the "political solution" recommended by the Circuit would involve "repeal" of something that does not exist. As a result, the repeal proposed by the Circuit might read something like: "To the extent that Section 101(b) contains any authority for the adoption of an AHRI, that authority is hereby repealed."

AHRI, the "political resolution" envisioned by the Circuit would require adoption of that repeal by a two-thirds, that is, a veto override, margin, as opposed to a simple majority. Thus, the Circuit's "political resolution" not only does grave damage to the Members' "constitutionally prescribed lawmaking powers," *Raines v. Byrd*, 117 S.Ct. at 2316, but also is inconsistent with the Circuit's view as to what constitutes "internal affairs of the legislative branch." Moreover, the Circuit's analysis conflicts with the holding of this Court in *Raines*, wherein this Court held that the *Raines* plaintiffs had suffered no injury because "*a majority* of Senators and Congressm[e]n can [still] pass or reject [ ] bills . . . " *Raines v. Byrd*, 117 S.Ct. at 2320 (emphasis added). Clearly, "a majority" is not enough in this case.

The weakness of the Circuit's "internal affairs" analysis is demonstrated further by its view that the Circuit's holding in *Kennedy* is consistent with *Raines*. In the Circuit's view, *Kennedy* is consistent with *Coleman* because a pocket veto of legislation adopted by Congress nullified the votes of those favoring the bill. However, this is a distinction without a difference. Whether a president unconstitutionally enacts a law without a vote by Congress, as in the instant case, or unconstitutionally vetoes legislation adopted by Congress, as in *Kennedy*, that president has nullified the votes of Congress contrary to the Constitution.[17]

---

[17] The "political resolution" that the Circuit concluded is available here was also available in *Kennedy*. Congress would need only to pass the legislation that was the subject of the pocket veto in sufficient time to prevent another pocket veto and by sufficient votes to override a veto.

Because this case presents a matter of exceptional importance and because the holding of the Circuit is in true, direct, intolerable, and irreconcilable conflict with the holdings of this Court in *Coleman* and *Raines*, this Court should grant the Petition.

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT AND DECISIONS OF THIS COURT REGARDING THE ABILITY OF ELECTED REPRESENTATIVES, WHOSE VOTES HAVE BEEN NULLIFIED, TO HAVE STANDING TO CHALLENGE SUCH VOTE NULLIFICATION.

A. The District Of Columbia Circuit Misstated And Misunderstood The Factual Analysis By This Court.

The District of Columbia Circuit overlooked the factual analysis engaged in by this Court in *Coleman*. As a result, the Circuit overlooked the fact that the injury in this case is much like the injury in *Coleman*. In *Raines*, this Court emphasized that the votes of the legislative plaintiffs in *Coleman* had been "*overridden* and *virtually held for naught*." 117 S.Ct. at 2319 (emphasis in original). Similarly, in this case, because the President enacted the AHRI contrary to the manner provided for in the Constitution, thus affecting the Members' "constitutionally prescribed lawmaking powers," the votes that the Members would have cast were "overridden and virtually held for naught." The fact that Congress was not permitted to vote on the AHRI before President Clinton signed it into law by means of an Executive Order does not alter the

analysis required by *Coleman*. In fact, the District Court held that this case involves a "greater nullification of [the Members'] voting power than that suffered by the plaintiffs in *Coleman*, since the [Members] never even had the opportunity to debate and vote on the AHRI."[18] *Chenoweth v. Clinton*, 997 F.Supp. at 39.

Granted, the *Coleman* Court noted that the votes of the legislative plaintiffs "would have been sufficient [to prevail]," 307 U.S. at 438, and the *Raines* Court placed emphasis on that aspect of the *Coleman* decision. However, the significance of that fact in the instance case is uncertain given the conspicuous refusal of the *Raines* Court to address the District of Columbia Circuit's repeated recognition of Members' standing to challenge measures that affect their constitutionally prescribed lawmaking powers.

Because the Circuit held that this Court had overturned the twenty-five years of case law associated with the Circuit's holdings in *Kennedy* through *Moore* and because the Circuit's holding is in conflict with the holdings of this Court in *Coleman* and *Raines*, this Court should grant the Petition.

---

[18] The absence of a vote in this case does not change the *Coleman*-type analysis. Why would the Members here have standing, under *Coleman*, if President Clinton signed the AHRI Executive Order after Congress rejected legislation creating the AHRI, but not if he signed the unconstitutional AHRI Executive Order before a vote by Congress? In both cases, the Members' votes would have been nullified.

B. The Political Resolution Analysis Applied By The District Of Columbia Circuit Is In Conflict With The Analysis Applied By This Court.

The Circuit concluded that the Members here are unlike the *Coleman* plaintiffs because the elected officials in *Coleman* were deprived of their "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438. But by its holding that the Members "cannot claim their votes were effectively nullified by the machinations of the Executive," *Chenoweth v. Clinton*, 181 F.3d at 117, the Circuit ignored the fact that the Members would be required to marshal sufficient votes to override a veto by President Clinton.[19] Thus, strictly from the standpoint of the difference between a mere majority and a two-thirds majority, the effectiveness of the four votes represented by the Members here has been nullified.[20] Of course, the greatest

---

[19] The Circuit demands that the Members here "allege that the necessary majorities in the Congress voted to block the AHRI." *Chenoweth v. Clinton*, 181 F.3d at 117. Yet, because President Clinton enacted a law that Congress must now "repeal" by a veto override margin, the Members need, not a simple majority, but a two-thirds majority. Not only does such a required margin for enacting laws violate the process set forth in the Constitution, but it also reduces the "effectiveness" of the votes of the Members.

[20] Had the AHRI been proposed as legislation in accordance with the "process by which a bill becomes law," *Moore v. United States House of Representatives*, 733 F.2d at 951, the Members would have needed a mere majority (*i.e.*, 218 votes) to defeat that legislation. Because President Clinton enacted the AHRI by Executive Order and would likely veto any attempt to "repeal" the AHRI, the Members will need a two-thirds majority (*i.e.*, 290 votes). Thus, the "effectiveness" of the Members' votes has been reduced by the difference between 4/218 and 4/290.

injury to the effectiveness of the Members' votes was the enactment of federal law contrary to the manner set forth in the Constitution.

Because the holding of the Circuit is in conflict with the holding of this Court in *Coleman* and *Raines*, this Court should grant the Petition.

III. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT AND DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS REGARDING THE ABILITY OF COURTS TO OVERTURN BINDING CASE LAW BY IMPLICATION.

As set forth above, the District of Columbia Circuit overturned binding case law of that Circuit in response to the holding of this Court in *Raines*, notwithstanding the fact that this Court did not overturn that case law. Not only did this Court not overturn the District of Columbia Circuit's binding case law, this Court pointedly chose not to address that case law. Thus, the District of Columbia Circuit's decision was founded on its view that this Court, in ruling in *Raines*, overturned the Circuit's binding case law by implication. As a result, the District of Columbia Circuit's decision places that Circuit in true, direct, intolerable, and irreconcilable conflict with the holdings of other Circuit Courts of Appeals.

In a decision directly applicable here, the Fifth Circuit ruled that, although "[a] panel of [the Fifth Circuit] may overrule the existing law in the circuit if an intervening Supreme Court decision so requires," the implications

of the Supreme Court holding must be "so direct as to allow this panel to depart from the [Circuit] Court's previous decisions." *Guevera v. Maritime Overseas Corp.*, 34 F.3d 1279, 1284 (5th Cir. 1994) (*per curiam*). Here, the District of Columbia Circuit Court should have held that *Raines* was too indirect to permit the Circuit to depart from the Circuit's previous decisions, especially given that this Court had the opportunity to express an opinion as to the constitutionality of the Circuit's repeated recognition of congressional standing, but declined to do so.

Likewise, the Fourth Circuit held that "[a] subsequent decision cannot, by mere implication, be held to overrule a prior case unless the *principle is directly involved* and the *inference clear and compelling.*" *Kestler v. Board of Trustees of N. Carolina Local Gov't Employees' Retirement System*, 48 F.3d 800, 804 (4th Cir. 1995) (emphasis added). Because *Raines* does not explicitly overrule, let alone criticize, the District of Columbia Circuit's line of cases, the Fourth Circuit's holding has even more force in the instant case.

The Eleventh Circuit held that it is "bound to follow a prior panel or *en banc* holding, except where that holding has been *overruled* or *undermined to the point of abrogation* by a subsequent *en banc* or Supreme Court decision." *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998). Further, "[e]ven if [a specific case] portends a major change in the Supreme Court's approach to [an issue], we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled by the Supreme Court." *Engineering Contractors Ass'n of S. Fla Inc. v. Metropolitan Dade County*, 122 F.3d 895, 908 (11th Cir. 1997). As to the instant case,

Raines neither overruled nor undermined, to the point of abrogation, the District of Columbia Circuit's line of cases regarding congressional standing. Thus, the District of Columbia Circuit Court was not at liberty to disregard the binding case law of that Circuit.

Finally, Circuit Judge Davis in *Hague v. Committee for Indus. Org.*, 101 F.2d 774, 801 (3rd Cir. 1939) (dissenting), set forth the Third Circuit's rule that overruling a decision by implication is an unpopular doctrine and usually not allowed.

Because the District of Columbia Circuit's holding that this Court overturned the Circuit's binding case law by implication is in conflict with other Circuit Courts of Appeals and because that holding does grievous damage to the doctrine of *stare decisis* in the wake of Supreme Court opinions, this Court should grant the petition to resolve this conflict.

CONCLUSION

For all the above reasons, this Court must grant the Petition.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
**Counsel of Record*
ROGER JACQUES KOTHARY
Mountain States Legal Foundation
707 Seventeenth Street, Suite 3030
Denver, Colorado 80202
(303) 292-2021
Attorneys for Petitioner

Dated: December 2, 1999

APPENDIX INDEX

Page

District of Columbia Circuit decision, July 2, 1999; 181 F.3d 112 (1999) ..... App. 1

District Court decision, March 2, 1998; 997 F.Supp. 36 (1998) ..... App. 16

Order denying Petition for Rehearing En Banc, filed September 3, 1999 ..... App. 29

Executive Order 13061, 62 Fed. Reg. 48,445 (1997) ..... App. 30

The Honorable Helen CHENOWETH, the Honorable Bob Schaffer, the Honorable Don Young, and the Honorable Richard W. Pombo, all in their official capacities, Appellants,

v.

William J. CLINTON, President of the United States, Kathleen A. McGinty, Chair of the Council on Environmental Quality, individually and in their official capacities, and the United State of America, Appellees.

No. 98-5095.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 29, 1999.

Decided July 2, 1999.

Appeal from the United States District Court for the District of Columbia (No. 97cv02954).

William Perry Pendley argued the cause and filed the briefs for appellants. Todd S. Welch entered an appearance.

Ethan G. Shenkman, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Lois J. Schiffer, Assistant Attorney General, and Martin W. Matzen, Attorney. Jared A. Goldstein, Attorney, entered an appearance.

Before: EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Opinion concurring in the judgment filed by Circuit Judge TATEL.

GINSBURG, Circuit Judge:

Appellants Helen Chenoweth, Bob Schaffer, Don Young, and Richard W. Pombo, all of whom are Members of the United States House of Representatives, sued to enjoin implementation of President Clinton's American Heritage Rivers Initiative (AHRI). They claimed the President's creation of the program by executive order exceeded his statutory and constitutional authority. Characterizing the Representatives' claim as a "generalized grievance[ ] about the conduct of government," the district court held the plaintiffs lacked standing to sue and dismissed their complaint. The Representatives now appeal, arguing that the district court failed properly to apply our decisions in *Kennedy v. Sampson*, 511 F.2d 430 (1974), and *Moore v. U.S. House of Representatives*, 733 F.2d 946 (1984). In part based upon the intervening decision in *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), we affirm the judgment of the district court.

I. Background

The President announced his intention to create the AHRI in his 1997 State of the Union address. Soon afterward, the Council on Environmental Quality published a notice describing the program. Under the AHRI, it explained, federal agencies would be called upon to provide support for local efforts to preserve certain historically significant rivers and riverside communities. *See* 62 Fed.Reg. 27,253 (May 19, 1997). In June, 1997 Representatives Chenoweth, Schaffer, and Pombo introduced a bill

"[t]o terminate further development and implementation" of the AHRI. H.R. 1842, 105th Congress. The bill never came to a vote. The President formally established the AHRI by executive order in September, 1997. *See* Exec. Order 13,061, 62 Fed.Reg. 48,445.

Their legislative efforts having failed, the appellants brought this lawsuit, claiming the AHRI violates the Anti-Deficiency Act, 31 U.S.C. § 1301 et seq., the Federal Land Management and Policy Act, 43 U.S.C. § 1701 et seq., the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and the Commerce, Property, and Spending Clauses of, and the Tenth Amendment to, the Constitution of the United States. According to the complaint, the President's issuance of the AHRI by executive order, without statutory authority therefor, "deprived [the plaintiffs] of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation" involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of the NEPA. The Representatives sought a declaration that the issuance of the AHRI was unlawful and an injunction against its implementation.

The district court granted the President's motion to dismiss, concluding that the injury the Representatives claim to have suffered – the deprivation of their right as Members of the Congress to vote on (or, more precisely, against) the AHRI – is "too abstract and not sufficiently specific to support a finding of standing." The Representatives then took this appeal.

II. Analysis

The Representatives' claim of standing is predicated upon the theory that by issuing Executive Order 13,061, the President denied them their proper role in the legislative process and, consequently, diminished their power as Members of the Congress. They rely primarily upon *Moore*, in which we held that the infringement of a legislator's "right[ ] to participate and vote on legislation in a manner defined by the Constitution" is an injury sufficiently direct and concrete to support the legislator's standing to sue. 733 F.2d at 951. To understand why their facially plausible argument is unpersuasive, some background is necessary.

The general principle that governs our standing analysis is firmly established: A federal court cannot, consistent with Article III, exercise jurisdiction over a lawsuit unless the plaintiff has suffered a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Application of the general rule to a Member of the Congress who objects to the actions of other participants in the legislative process, however, is a subject upon which this court has not spoken with great clarity.

Historically, political disputes between Members of the Legislative and the Executive Branches were resolved without resort to the courts. *See Raines*, 521 U.S. at 826-28, 117 S.Ct. 2312 (describing conflicts between Congress and various Presidents decided in the political arena). When Members of the Congress first began to seek judicial relief from allegedly illegal executive actions that impaired the

exercise of their power as legislators, however, we were initially receptive to the idea that we had jurisdiction to hear their complaints. In *Kennedy*, for instance, we found that a United States Senator had standing to challenge the President's pocket veto of legislation that both Houses of the Congress had approved. The allegedly unlawful veto, we reasoned, injured the Senator in a direct and personal way because it effected a "diminution of congressional influence in the legislative process." 511 F.2d at 435. On the same theory, we held that a group of Senators had standing to sue the President for depriving them of a constitutionally-mandated opportunity to vote on the abrogation of a treaty. *See Goldwater v. Carter*, 617 F.2d 697, 702 (en banc), *vacated on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979).

After we decided *Kennedy*, however, the Supreme Court began to place greater emphasis upon the separation of powers concerns underlying the Article III standing requirement. Compare *Flast v. Cohen*, 392 U.S. 83, 100, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) ("The question whether a particular person is a proper party to maintain [an] action does not, by its own force, raise separation of powers problems"), with *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (standing requirement "founded in concern about the proper – and properly limited – role of the courts in a democratic society"), and *Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315 ("[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers"). In decisions following *Kennedy* we noted that those concerns are present – indeed, are particularly acute – when a legislator attempts to bring an essentially political dispute into a

judicial forum. Accordingly, in *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (1981), we dismissed the complaint of a Senator who challenged the constitutionality of procedures by which certain members of the FOMC were appointed; this result, we held, was necessary in order to avoid an "obvious intrusion by the judiciary into the legislative arena." *Id.* at 881. We did not, however, disavow the standing analysis of *Kennedy* and *Goldwater*. Instead, creating a doctrine of "circumscribed equitable discretion," we held that the court would decline to hear the complaint of a Congressman who "could obtain substantial relief from his fellow legislators" regardless whether he had standing to sue. *Id.* Keeping distinct our analysis of standing and our consideration of the separation of powers issues raised when a legislator brings a lawsuit concerning a legislative or executive act, we concluded, made consonant two otherwise irreconcilable principles: first, that congressional and private plaintiffs should be treated alike for the purpose of determining their standing, and second, that courts should refrain from interfering in disputes arising out of the legislative process when a political remedy is available from within that process. *See id.* at 877-82.

But the circle did not long stay squared. Observing that jurisdictional issues such as standing are not of a sort usually committed to the discretion of courts, *see Moore*, 733 F.2d at 962 (Scalia, J., concurring), we questioned *Riegle* as frequently as we applied it. *See, e.g., Humphrey v. Baker*, 848 F.2d 211, 214 (1988) (concerns about the doctrine of equitable discretion "continue to trouble us"); *Melcher v. Federal Open Market Comm.*, 836 F.2d 561, 565 n. 4 (1987) (expressing doubt as to continuing viability of

doctrine). The practical significance of *Riegle* was also open to question: With one exception, namely, *Bliley v. Kelly*, 23 F.3d 507, 510 (1994), every decision in which we applied the doctrine of equitable discretion was either reversed upon another jurisdictional ground by the Supreme Court, *see Barnes v. Kline*, 759 F.2d 21 (C.A.D.C.1985), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987), or reached the same result that would have obtained had we treated separation of powers concerns as part of our inquiry into the plaintiff's standing. *See, e.g., Moore*, 733 F.2d at 956; *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1175 (1982). In *Moore*, for instance, we held that although congressmen had standing to object to the purportedly unconstitutional origination of a revenue-raising bill in the Senate, the district court properly dismissed their complaint under *Riegle* because their "rights [could] be vindicated by congressional repeal of the [offending] statute." 733 F.2d at 956. Our conclusion that the plaintiffs had standing to sue, in other words, got them into court just long enough to have their case dismissed because of the separation of powers problems it created. Recognizing the limited impact of the *Riegle* doctrine, we noted in *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C.Cir.1984), that "[i]t seems . . . inconvenient . . . to distinguish between those legislator claims that lack standing, and those that should be denied a favorable exercise of remedial discretion for reasons generally indistinguishable from those that underlie the doctrine of standing." *Id.* at 1382.

So matters stood when the Supreme Court recently decided *Raines v. Byrd*. The plaintiffs in that case were congressmen who objected to the Line Item Veto Act,

which gave the President the authority to "cancel" spending provisions in an appropriations bill without vetoing the bill in its entirety. According to the plaintiffs, the Act injured them by "alter[ing] the legal and practical effect of all votes they . . . cast on bills containing . . . separately vetoable items," thus "divest[ing them] of their constitutional role" in the legislative process. 521 U.S. at 816, 117 S.Ct. 2312. The district court found that the plaintiffs had standing, citing *Moore* for the proposition that an act interfering with the "constitutionally mandated process of enacting law" imposes upon legislators an injury cognizable under Article III. *Byrd v. Raines*, 956 F.Supp. 25, 31 (D.D.C.1997).

On direct appeal, the Supreme Court reversed. The Court characterized the plaintiffs' injury as "wholly abstract and widely dispersed" and hence insufficient to warrant judicial remediation. 521 U.S. at 829, 117 S.Ct. 2312. The Court was apparently unmoved by the concern we expressed in *Moore* that the consideration of separation of powers issues would "distort[ ]" our standing analysis, 733 F.2d at 954; to the contrary, it emphasized that standing requirements are "especially rigorous" when reaching the merits of a case would raise questions about the proper scope of judicial authority. 521 U.S. at 819-20, 117 S.Ct. 2312. Having found that the plaintiffs lacked standing to sue, the Court did not find it necessary to consider the applicability (or the validity) of the doctrine of equitable discretion.

Against the backdrop of *Raines* and our own decisions after *Goldwater*, the futility of the present Representatives' claim is apparent. As the plaintiffs point out, the injury they allegedly suffered when the President issued

Executive Order 13,061 – a dilution of their authority as legislators – is precisely the harm we held in *Moore* and *Kennedy* to be cognizable under Article III. It is also, however, identical to the injury the Court in *Raines* deprecated as "widely dispersed" and "abstract." If, as the Court held in *Raines*, a statute that allegedly "divests [congressmen] of their constitutional role" in the legislative process does not give them standing to sue, 521 U.S. at 816, 117 S.Ct. 2312, then neither does an Executive Order that allegedly deprives congressmen of their "right[ ] to participate and vote on legislation in a manner defined by the Constitution." 733 F.2d at 951. Consequently, the portions of our legislative standing cases upon which the current plaintiffs rely are untenable in the light of *Raines*.

The Representatives protest that the injury alleged in *Raines* was less severe than that suffered by the plaintiffs in *Moore*. The votes of those Members of the Congress who opposed the Line Item Veto Act, they observe, were given full effect; they were simply too few to carry the day. The plaintiffs in *Moore*, on the other hand, claimed to have been entirely deprived of their constitutional right to originate a bill intended to raise revenue. Here, similarly (per the plaintiffs), the President denied Members of the Congress any opportunity to vote for or against the AHRI. Not only does *Moore* therefore survive *Raines*, urge the Representatives, but the present case more closely resembles the former than the latter.

This reasoning misperceives the theory of standing at issue in *Raines*. The plaintiffs in that case did not contend, as the Representatives imply, that their injury was the result of a procedural defect in the passage of the Line

Item Veto Act. Rather, their view was that once the Act became law, it "alter[ed] the constitutional balance of powers between the Legislative and Executive Branches," to their detriment. 521 U.S. at 816, 117 S.Ct. 2312. This is only a minor variation on the injury asserted in *Moore*, where the beneficiary of the alleged change in the constitutional order was the Senate rather than the President. More to the point, it is exactly the position taken by the Representatives here: Their injury, they say, is the result of the President's successful effort "to usurp Congressional authority by implementing a program, for which [he] has no constitutional authority, in a manner contrary to the Constitution." Applying *Moore*, this court presumably would have found that injury sufficient to satisfy the standing requirement; after *Raines*, however, we cannot.

Raines notwithstanding, *Moore* and *Kennedy* may remain good law, in part, but not in any way that is helpful to the plaintiff Representatives. Whatever *Moore* gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion. It is uncontested that the Congress could terminate the AHRI were a sufficient number in each House so inclined. Because the parties' dispute is therefore fully susceptible to political resolution, we would, applying *Moore*, dismiss the complaint to avoid "meddl[ing] in the internal affairs of the legislative branch." 733 F.2d at 956. Applying *Raines*, we would reach the same conclusion. *Raines*, therefore, may not overrule *Moore* so much as require us to merge our separation of powers and standing analyses. In citing *Moore*, of course, the Representatives are not asking us to do that; instead, they would have us simply ignore half of that opinion.

As for *Kennedy*, it may survive as a peculiar application of the narrow rule announced in *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). The plaintiffs in *Coleman* were certain Kansas legislators who alleged that the Lieutenant Governor of Kansas had acted unlawfully by casting the tie-breaking vote in the state senate in favor of a constitutional amendment. According to the Court, the 20 legislators who had voted against the amendment had standing to sue because the Lieutenant Governor's act deprived them of their "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438, 59 S.Ct. 972.

Although *Coleman* could be interpreted more broadly, the *Raines* Court read the case to stand only for the proposition that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified." 521 U.S. at 823, 117 S.Ct. 2312. Even under this narrow interpretation, one could argue that the plaintiff in *Kennedy* had standing. The pocket veto challenged in that case had made ineffective a bill that both houses of the Congress had approved. Because it was the President's veto – not a lack of legislative support – that prevented the bill from becoming law (either directly or by the Congress voting to override the President's veto), those in the majority could plausibly describe the President's action as a complete nullification of their votes.

In this case, however, the Representatives do not allege that the necessary majorities in the Congress voted to block the AHRI. Unlike the plaintiffs in *Kennedy* and

Coleman, therefore, they cannot claim their votes were effectively nullified by the machinations of the Executive. Consequently, even if *Kennedy* is still viable after *Raines*, it cannot bear the weight the Representatives would place upon it.*

III. Conclusion

The district court correctly held the plaintiff Representatives lack standing to pursue this lawsuit. Their claim to standing on the ground that the President's implementation of the AHRI without congressional consent injured them by diluting their authority as Members of the Congress is indistinguishable from the claim to

---

* For two reasons our concurring colleague would have us decide this case as though the Supreme Court had never decided *Raines*. First he says the effect of *Raines* upon our prior decisions was not briefed by the parties. However, the parties plainly joined the issue whether *Raines* overrules our cases on the subject of legislative standing. *See* Appellees' Br. at 16 ("After the Supreme Court's decision in *Raines* . . . it is questionable whether a member of Congress alleging an institutional injury can ever have Article III standing"); Appellant's Rep. Br. at 7 (asserting "[t]here is absolutely no authority" supporting the President's assertion "that *Raines* overturned *Moore*").

Second, he says the Representatives would lack standing even under the pre-*Raines* law of this circuit. This point rests upon the implicit premise that the standing analysis in *Moore* and *Kennedy* might have force after *Raines*, albeit (as he acknowledges) in circumstances not presented here. We think it clear, however, that our analysis in this case must account for the impact of *Raines* on the prior precedent of this circuit, and further, that *Raines* leaves no room for the broad theory of legislative standing that we adopted in *Moore* and *Kennedy*.

standing the Supreme Court rejected in *Raines*. Nor can the Representatives claim that their vote was nullified by the President's action. The decision of the district court is therefore

Affirmed.

TATEL, Circuit Judge, concurring in the judgment:

I agree that appellants lack standing. I think the court should have reached that result, however, without exploring the extent to which *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), limits our decisions in *Kennedy v. Sampson*, 511 F.2d 430 (D.C.Cir.1974), and *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C.Cir.1984). *See* Maj. Op. at 115-17.

In the course of deciding that *Raines* essentially overrules the theory of legislative standing recognized in *Kennedy* and *Moore*, my colleagues read those decisions too broadly, stating that the legislator injury we found cognizable in those cases "is precisely the harm" that appellants allege here. Maj. Op. at 116. But unlike appellants, the legislators in *Kennedy* and *Moore* challenged alleged constitutional defects in the way specific pieces of legislation were passed or defeated. *See Moore*, 733 F.2d at 951-53 (revenue-raising bill allegedly originated in the Senate, not the House); *Kennedy*, 511 F.2d at 434-36 (allegedly unconstitutional presidential pocket veto of legislation passed by Congress). Contrary to appellants' claim that they have been "denied the 'right[ ] to participate and vote on legislation in a manner defined by the Constitution,' " Appellant's Br. at 16 (quoting *Moore*, 733 F.2d at 951), they can point to no defect in any "discrete aspect of the process by which a bill becomes law (the

actual vote on the legislation) [or] those post-enactment events denying the bill's status as law," *Harrington v. Bush*, 553 F.2d 190, 211 (D.C.Cir.1977). This case is therefore indistinguishable from and controlled by *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C.Cir.1984). There, as here, a Member of Congress challenged the legality of an executive order, claiming that it was promulgated without congressional or constitutional authorization. *See id.* at 1381-82. We held that the Member lacked standing because he raised only " 'a generalized grievance about the conduct of government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law.' " *Id.* at 1382 (quoting *Moore*, 733 F.2d at 952); *see also Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C.Cir.1978) (rejecting the argument that legislators have standing to challenge executive nonenforcement of an act as a usurpation of the legislative right to enact repealing legislation); *Harrington*, 553 F.2d at 211 (rejecting the argument that a legislator has standing to challenge allegedly illegal CIA activities as an impairment of his prospective votes on related legislation). For precisely the same reason, appellants lack standing to challenge the American Heritage Rivers Initiative.

Although *Raines* limits *Kennedy* and *Moore* to some extent, it changes nothing in *United Presbyterian* or the other cases where we have rejected legislator standing to raise similar "generalized grievances." Because *United Presbyterian* still squarely controls, it is unnecessary to reach the difficult issue of the precise extent to which *Raines* limits *Kennedy* and *Moore*, an issue not briefed in this case beyond the conclusory assertions cited by the

court. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 697-98 (D.C.Cir.1991) (in the "absence of any substantive briefing on the issue," where the parties "content [themselves] with conclusory assertions," this court normally will not address the argument). I think the court should have deferred addressing the implications of *Raines* until presented with a case in which legislators assert injury involving a discrete aspect of the process by which a specific bill has become (or failed to become) law.

The Honorable Helen CHENOWETH, et al., Plaintiffs,

v.

William J. CLINTON, et al., Defendants.

No. 97-2954(HHK).

United States District Court,

District of Columbia.

March 2, 1998.

William Perry Pendley, Mountain States Legal Foundation, Denver, CO, for Plaintiffs.

Geoffrey Garver, U.S. Dept. of Justice, Environ. & Natural Resources Div., Washington, DC, for Defendants.

MEMORANDUM

KENNEDY, District Judge.

Before this court is the plaintiffs' Motion for Preliminary Injunction and the defendants' Motion to Dismiss. Upon consideration of these motions, the responses thereto, and the entire record of the case, the court concludes that the plaintiffs' motion should be denied and that the defendants' motion should be granted on the ground that the plaintiffs lack standing to bring this action.

I. BACKGROUND

Plaintiffs are four members of the U.S. House of Representatives who have sued William Clinton, President of the United States, for allegedly violating the

United States Constitution by issuing Executive Order 13061. On September 11, 1997, President Clinton signed Executive Order 13061, which created the American Heritage Rivers Initiative (AHRI), an initiative designed "to protect and restore rivers and their adjacent communities." Exec. Order No. 13061, 62 Fed.Reg. 48445 (1997). Under the AHRI, "the President will designate rivers that meet certain criteria as 'American Heritage Rivers,' " and "executive agencies . . . , to the extent permitted by law . . . , shall coordinate Federal plans, functions, programs, and resources to preserve, protect, and restore rivers and their associated resources important to our history, culture, and natural heritage." *Id.* at Section 1(e), (b).

The plaintiffs contend that the President may not create legislation in the form of an Executive Order unless Congress has expressly delegated such authority to the President. The plaintiffs argue that Congress has not delegated to the president the authority to create the AHRI and that the president's action of signing Executive Order 13061 therefore violates the doctrine of Separation of Powers, as well as the Commerce Clause (Art. I, Sec. 8, Cl. 3), Property Clause (Art. IV, Sec. 3, Cl. 2), Spending Clause (Art. I, Sec. 9, Cl. 7) and Tenth Amendment of the U.S. Constitution, and the Anti-Deficiency Act, 31 U.S.C. § 1301 *et seq.*, the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* Specifically, the President's action has deprived plaintiffs "of their ability to exercise their duties to review, debate, and vote on pending legislation and to conduct oversight as . . . included within the jurisdiction of their Committee

and Subcommittees," and "of their constitutionally guaranteed responsibilities as Members of Congress to regulate interstate commerce, manage and regulate federal lands, and authorize and appropriate federal expenditures." (Pls.' Mot. for Prelim. Inj. at 7.) These are the injuries upon which the plaintiffs base their standing to bring this suit.

The defendants claim that Executive Order 13061 relies entirely on existing federal programs and results in no new regulatory authority, and therefore is constitutional. The defendants argue, further, that it is not necessary to reach the merits of the plaintiffs' complaint because the complaint should be dismissed for lack of standing. The court agrees that the complaint should be dismissed for lack of standing.

II. STANDING

For the purposes of determining the plaintiffs' standing, "we must assume the validity of the [plaintiffs'] claim and construe the complaint in favor of the complaining parties." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 950 (1984) (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Thus, we assume for this analysis that the President's signing of Executive Order 13061 unconstitutionally violated the Separation of Powers doctrine and the other constitutional provisions and statutes cited by plaintiffs.

The recent Supreme Court case, *Raines v. Byrd*, ___ U.S. ___, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), discusses the doctrine of standing. The court states,

> Under Article III, § 2 of the Constitution, the federal courts have jurisdiction over this dispute . . . only if it is a "case" or "controversy." . . . One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue. . . . To meet the standing requirements of Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." . . . [T]o have standing, the plaintiff must have suffered a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way."

Raines, ___ U.S. at ___, 117 S.Ct. at 2317, 138 L.Ed.2d 849 (internal citations omitted).

The Supreme Court further explains, "We have always insisted on strict compliance with this jurisdictional standing requirement. . . . And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* 117 S.Ct. at 2317-2318 (internal citations omitted). Therefore, the court concluded, "we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 2318.

Raines is directly relevant to the instant case because it is the most recent Supreme Court case and one of only a few addressing the issue of standing for legislators. In

Raines, members of Congress challenged the constitutionality of the Line Item Veto Act, 2 U.S.C.A. § 691 *et seq.* (Supp.1997), which gives the President authority to "cancel" certain spending and tax benefit measures after he has signed them into law, thus allegedly diluting the Congress members' Article I voting power. While *Raines* does not directly address the circumstances of the instant case, it provides important guide posts for our analysis.

First, *Raines* distinguishes between a personal injury (the loss of a private right) and an institutional injury (the loss of political power) as the basis of a legislator's standing. While *Raines* does not categorically require that standing be based on a personal/private injury, it does suggest that a personal injury more strongly supports a finding of standing than does an institutional injury: "[A]ppellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete." *Id.* 117 S.Ct. at 2318.

That said, however, *Raines* clearly upholds *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), which found that state legislators claiming an institutional injury had standing. *Id.* 117 S.Ct. at 2318 ("The one case in which we have upheld standing for legislators (albeit state legislators) claiming an institutional injury is *Coleman v. Miller*"). In *Coleman*, 20 Kansas state senators' "votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Id.* at 2319 (quoting *Coleman*, 307 U.S. at 438). Therefore, because the legislators "have a plain,

direct and adequate interest in maintaining the effectiveness of their votes," and their votes were improperly overridden and effectively nullified, the Supreme Court upheld the legislators' standing. *Id.*

In the instant case, while the plaintiffs argue that they have suffered personal injuries as members of specific House Committees and Subcommittees, their injuries are clearly institutional, rather than personal. The *Raines* court identified an institutional injury as follows:

> If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.

Id. 117 S.Ct. at 2318. In contrast, an indication of a personal injury is when the plaintiffs have been singled out for specially unfavorable treatment relative to other Members of their respective bodies. *Id.* The plaintiffs in the instant case have not been singled out for unfavorable treatment relative to their fellow legislators, nor would their claim continue to exist if they were to retire. Their alleged injuries, therefore, are institutional rather than personal.

While *Raines* upheld the viability of an institutional injury as a basis for standing, the Court substantially limited the reach of its determination by stating "that our holding in *Coleman* stands (at most, see n. 8, *infra*) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act

have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id.* The court concluded, therefore, that the plaintiffs in *Raines* did not have standing, under *Coleman*, because they neither (1) matched the specific circumstances of *Coleman*, nor (2) had their votes nullified to the extent of the legislators in *Coleman*, since "[i]n the future, a majority of Senators and Congressmen can pass or reject appropriations bills . . . can vote to repeal the Act, or to exempt a given appropriations bill . . . from the Act. . . . " *Id.* 117 S.Ct. at 2320. Regarding this second prong, the court explained, "There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step." *Id.* 117 S.Ct. at 2320-2321. The court concluded, "In sum, appellees have alleged no injury to themselves as individuals (contra *Powell*), the institutional injury they alleged is wholly abstract and widely dispersed (contra *Coleman*), and their attempt to mitigate this dispute at this time and in this form is contrary to historical experience." *Id.* 117 S.Ct. at 2322.

As applied to the instant case, *Raines* directs that, given the vigorous standing inquiry that applies to suits alleging unconstitutional action by the legislative or executive branch, and the relative weakness of institutional injuries compared to personal injuries, an institutional injury may support legislative standing only if the injury occurs under the same circumstances as those in *Coleman*, or in some other way matches the level and quality of

vote nullification that took place in *Coleman*. The *Raines* plaintiffs failed to establish standing because their injury was too abstract and dispersed, and did not reach the required level of vote nullification because legislative remedies were still available to them. The question we must answer, therefore, is whether the alleged injury suffered by Congresswoman Chenoweth and her fellow plaintiffs matches the vote nullification that took place in *Coleman*.

The plaintiffs in the instant case have suffered an injury (assuming, for the sake of this standing analysis, that their allegations are true) that is a greater nullification of their voting power than that suffered by the plaintiffs in *Coleman*, since the instant plaintiffs never even had the opportunity to debate and vote on the AHRI. The quality of plaintiffs' injury, however, is too abstract and not sufficiently specific to support a finding of standing. As defendants assert, the plaintiffs' claims that the AHRI violates the U.S. Constitution and other Federal statutes "are precisely the kind of 'generalized grievance[s] about the conduct of government' that the D.C. Circuit Court of Appeals, even before [*Raines*], has held 'lacks the specificity to support a claim of standing.' " (Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. at 13) (quoting *American Federation of Government Employees, AFL-CIO v. Pierce*, 697 F.2d 303, 305 (1982), *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). "[I]n the absence of any relation to a specific piece of legislation," the defendants argue, "the plaintiffs' assertion of standing is governed – and defeated – by the line of cases holding that a plaintiff's

status as a member of Congress does not give [him or her] standing to sue for a declaration that executive activities are illegal." *Id.* at 14 (internal quotes omitted).

Defendants' analysis of the D.C. Circuit case law is correct. While the plaintiffs are correct that D.C. Circuit cases have upheld the principle that a legislator has standing when the legislator has suffered an injury to his "interest in the process by which a bill becomes a law," *Pierce*, 697 F.2d at 305; *Moore*, 733 F.2d 946, other D.C. Circuit cases have held that an injury like the one claimed by the instant plaintiffs, perpetrated by the Executive branch and unrelated to a specific piece of legislation, is not sufficiently specific to support standing. *United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375 (1984), *Harrington v. Bush*, 553 F.2d 190 (1977), *Daughtrey v. Carter*, 584 F.2d 1050 (1978). This latter line of cases gains support from the rationale offered by Justice Souter in his concurrence in *Raines* that, "[b]ecause it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing, it behooves us to resolve the question under more general separation-of-powers principles underlying our standing requirements." *Raines*, ___ U.S. at ___, 117 S.Ct. at 2324, 138 L.Ed.2d 849 (Souter, J., concurring).

In *Pierce*, the Secretary of Housing and Urban Development (HUD) planned to carry out a reduction-in-force of the agency, which was prohibited by statute without the prior approval of the Committees on Appropriations. Because the plaintiff congressman was a member of the House Appropriations Committee, the Secretary's proposed action, which had not been approved by the Appropriations Committees, injured the plaintiff. The

plaintiff congressman had standing to challenge the Secretary's action because it deprived "him of [a] specific statutory right to participate in the legislative process." *Id.* This injury was sufficiently specific and concrete because of the specific statutory authority given only to members of the Committees on Appropriations to pre-approve any reorganizations of the HUD department.

Moore v. U.S. House of Representatives, upon which plaintiffs primarily rely, found that the plaintiff Members of the House of Representatives had standing to challenge the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), allegedly a revenue-raising bill, on the basis that it contravened the constitutional mandate that revenue-raising bills originate in the House, rather than in the Senate. "The injury alleged by [plaintiffs] here is to an interest positively identified by the Constitution, which mandates the specific procedure by which a revenue-raising bill shall become law." *Moore*, 733 F.2d at 951. The court found that the plaintiffs' alleged injury, the deprivation of an opportunity to debate and vote on the origination of TEFRA in the House, was "specific and concrete." *Id.* at 952. The plaintiffs in Moore, unlike the instant plaintiffs, were challenging the action of the Senate in relation to a specific piece of legislation.

In contrast, *United Presbyterian*, *Harrington*, and *Daughtrey* denied standing to plaintiffs challenging executive actions unrelated to passing a specific piece of legislation, as in the instant case, on the basis that their injuries were not sufficiently specific. *United Presbyterian*, in particular, involved facts very similar to the instant case. The *United Presbyterian* plaintiffs, which included one member of Congress, claimed that an Executive

Order unconstitutionally violated the principal of separation of powers because it was promulgated without congressional authorization. *United Presbyterian Church*, 738 F.2d at 1377. The D.C. Circuit characterized the congressman plaintiff's argument for standing as follows: "[The congressman] asserts that the Executive Order confers authority on the intelligence agencies beyond that authorized by Congress, and indeed that the order violates express limitations imposed by Congress. Therefore, appellant [congressman] claims that his powers as a legislator has been diminished, constituting sufficient injury to give him standing." *Id.* at 1381. The court found that the congressman did not have standing because "his complaint is a generalized grievance about the conduct of government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law." *Id.* at 1382 (quoting *Moore*, 733 F.2d at 952). The court further explained, "standing does not exist . . . where the legislator's grievance consists of generalized, amorphous injuries due to . . . the conduct of the Executive . . . [or] a generalized complaint that [his] effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum." *Id.* (quoting *Moore*, 733 F.2d at 951). The circumstances of *United Presbyterian* are sufficiently similar to the instant case that its holding directs us to find that the instant plaintiffs do not have standing.

In *Harrington v. Bush*, a Member of the U.S. House of Representatives sued for a declaration that certain foreign and domestic activities of the CIA were illegal and for an injunction prohibiting the CIA from using provisions of the Central Intelligence Agency Act of 1949 in connection

with the allegedly illegal activities. The plaintiff contended that the CIA's activities exceeded its delegated statutory authority, and that the use of the CIA Act provisions in conjunction with these activities was illegal. To establish standing, the plaintiff alleged that the CIA's activities injured his participation in the legislative process. The court found, however, that the plaintiff had "failed to show injury to his effectiveness as a Congressman," and thus had "no right to invoke the power of the federal judiciary." *Harrington*, 553 F.2d at 213.

In *Daughtrey v. Carter*, the plaintiffs, including two members of the U.S. House of Representatives, sued for declaratory relief and an injunction to restrain the operation of a Presidential Proclamation entitled Granting Pardon for Violations of the Selective Service Act, and an Executive Order implementing that Proclamation. The plaintiffs contended that the president had exceeded the limits of his constitutional pardon power and usurped the power of Congress because executing the Order would purportedly violate a provision of the Immigration and Nationality Act. The court, characterizing the complaint as a "challenge to the failure of the Attorney General to enforce provisions of the Immigration and Nationality Act," found that the Congressmen lacked standing because the executive branch's failure to enforce legislation "does not affect the legal status of such legislation, nor does it invade, usurp, or infringe upon a Congressman's power to make law." *Daughtrey*, 584 F.2d at 1057.

III. CONCLUSION

The defendants are correct that the D.C. Circuit case law consistently denies standing for legislators challenging executive actions unrelated to passing a specific piece of legislation, without some further indication of concreteness or specificity. We must conclude in the instant case, therefore, that the instant plaintiffs, as Members of the U.S. House of Representatives challenging the constitutionality of an Executive Order for its lack of Congressionally delegated authority, are alleging injuries not sufficiently specific to support a finding of standing.

An appropriate order accompanies this memorandum.

ORDER

Pursuant to Fed.R.Civ.P. 58 and for the reasons stated by the court in its memorandum docketed this same day, it is this 2nd day of March 1998, hereby

ORDERED, that plaintiffs' motion for a preliminary injunction (document # 3) is denied; and it is further

ORDERED and ADJUDGED that defendants' motion to dismiss (document # 4) is granted and judgment is entered in favor of defendants.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5095 **September Term, 1999**
97cv02954

Helen Chenoweth, Honorable, et al.,

Appellants

v.

William J. Clinton, President
of the United States, et al.,

Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

(Filed Sept. 3, 1999)

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald did not participate in this matter.

Federal Register
Vol. 62, No. 178
Monday, September 15, 1997

Presidential Documents

Executive Order 13061 of September 11, 1997

Federal Support of Community Efforts Along American Heritage Rivers

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Environmental Policy Act of 1969 (Public Law 91-190), and in order to protect and restore rivers and their adjacent communities, it is hereby ordered as follows:

Section 1. *Policies.*

(a) The American Heritage Rivers initiative has three objectives: natural resource and environmental protection, economic revitalization, and historic and cultural preservation.

(b) Executive agencies ("agencies"), to the extent permitted by law and consistent with their missions and resources, shall coordinate Federal plans, functions, programs, and resources to preserve, protect, and restore rivers and their associated resources important to our history, culture, and natural heritage.

(c) Agencies shall develop plans to bring increased efficiencies to existing and authorized programs with

goals that are supportive of protection and restoration of communities along rivers.

(d) In accordance with Executive Order 12630, agencies shall act with due regard for the protection of private property provided for by the Fifth Amendment to the United States Constitution. No new regulatory authority is created as a result of the American Heritage Rivers initiative. This initiative will not interfere with matters of State, local, and tribal government jurisdiction.

(e) In furtherance of these policies, the President will designate rivers that meet certain criteria as "American Heritage Rivers."

(f) It is the policy of the Federal Government that communities shall nominate rivers as American Heritage Rivers and the Federal role will be solely to support community-based efforts to preserve, protect, and restore these rivers and their communities.

(g) Agencies should, to the extent practicable, help identify resources in the private and nonprofit sectors to aid revitalization efforts.

(h) Agencies are encouraged, to the extent permitted by law, to develop partnerships with State, local, and tribal governments and community and nongovernmental organizations. Agencies will be responsible to the diverse needs of different kinds of communities from the core of our cities to remote rural areas and shall seek to ensure that the role played by the Federal Government is complementary to the plans and work being carried out by State, local, and tribal governments. To the extent possible, Federal resources will be strategically directed

to complement resources being spent by these governments.

(i) Agencies shall establish a method for field offices to assess the success of the American Heritage River initiative and provide a means to recommend changes that will improve the delivery and accessibility of Federal services and programs. Agencies are directed, where appropriate, to reduce and make more flexible procedural requirements and paperwork related to providing assistance to communities along designated rivers.

(j) Agencies shall commit to a policy under which they will seek to ensure that their actions have a positive effect on the natural, historic, economic, and cultural resources of American Heritage River communities. The policy will require agencies to consult with American Heritage River communities early in the planning states of Federal actions, take in to account the communities' goals and objectives and ensure that actions are compatible with the overall character of these communities. Agencies shall seek to ensure that their help for one-community does not adversely affect neighboring communities. Additionally, agencies are encouraged to develop formal and informal partnerships to assist communities. Local Federal facilities, to the extent permitted by law and consistent with the agencies' missions and resources, should provide public access, physical space, technical assistance, and other support for American Heritage River communities.

(k) In addition to providing support to designated rivers, agencies will work together to provide information and services to all communities seeking support.

Sec. 2. *Process for Nominating an American Heritage River.*

(a) *Nomination.* Communities, in coordination with their State, local, or tribal governments, can nominate their river, river stretch, or river confluence for designation as an American Heritage River. When several communities are involved in the nomination of the same river, nominations will detail the coordination among the interested communities and the role each will play in the process. Individuals living outside the community may not nominate a river.

(b) *Selection Criteria.* Nominations will be judged based on the following:

(1) the characteristics of the natural, economic, agricultural, scenic, historic, cultural, or recreational resources of the river that render it distinctive or unique;

(2) the effectiveness with which the community has defined its plan of action and the extent to which the plan addresses, either through planned actions or past accomplishments, all three American Heritage Rivers objectives, which are set forth in section 1(a) of this order;

(3) the strength and diversity of community support for the nomination as evidence by letters from elected officials, landowners; private citizens; businesses; and especially State, local, and tribal governments. Broad community support is essential to receiving the American Heritage River designation; and

(4) willingness and capability of the community to forge partnerships and agreements to implement their plan to meet their goals and objectives.

(c) *Recommendation Process.*

The Chair of the Council on Environmental Quality ("CEQ") shall develop a fair and objective procedure to obtain the views of a diverse group of experts for the purpose of making recommendations to the President as to which rivers shall be designated. These experts shall reflect a variety of viewpoints, such as those representing natural, cultural, and historic resources; scenic, environmental, and recreation interests; tourism, transportation, and economic development interests; and industries such as agriculture, hydropower, manufacturing, mining, and forest management. The Chair of the CEQ will ensure that the rivers recommended represent a variety of stream sizes, diverse geographical locations, and a wide range of settings from urban to rural and ensure that relatively pristine, successful revitalization efforts are considered as well as degraded rivers in need of restoration.

(d) *Designation.*

(1) The President will designate certain rivers as American Heritage Rivers. Based on the receipt of a sufficient number of qualified nominations, ten rivers will be designated in the first phase of the initiative.

(2) The Interagency Committee provided for in section 3 of this order shall develop a process by which any community that nominates and has its river designated may have this designation terminated at its request.

(3) Upon a determination by the Chair of the CEQ that a community has failed to implement its plan, the Chair may recommend to the President that a designation be revoked. The chair shall notify the community at least 30 days prior to making such a recommendation to the

President. Based on that recommendation, the President may revoke the designation.

Sec. 3. *Establishment of an Interagency Committee.* There is hereby established the American Heritage rivers Interagency Committee ("Committee"). The Committee shall have two co-chairs. The Chair of the CEQ shall be a permanent co-chair. The other co-chair will rotate among the heads of the agencies listed below.

(a) The Committee shall be composed of the following members or their designees at the Assistant Secretary level or equivalent:

(1) The Secretary of Defense;

(2) The Attorney General;

(3) The Secretary of the Interior;

(4) The Secretary of Agriculture;

(5) The Secretary of Commerce;

(6) The Secretary of Housing and Urban Development;

(7) The Secretary of Transportation;

(8) The Secretary of Energy;

(9) The Administrator of the Environmental Protection Agency;

(10) The Chair of the Advisory Council on Historic Preservation;

(11) The Chair person of the National Endowment for the Arts; and

(12) The Chairperson of the National Endowment for the Humanities.

The Chair of the CEQ may invite to participate in meetings of the Committee, representatives of other agencies, as appropriate.

(b) The Committee shall:

(1) establish formal guidelines for designation as an American Heritage River;

(2) periodically review the actions of agencies in support of the American Heritage Rivers;

(3) report to the President on the progress, accomplishments, and effectiveness of the American Heritage Rivers initiative; and

(4) perform other duties as directed by the Chair of the CEQ.

Sec. 4. *Responsibilities of the Federal Agencies.* Consistent with Title I of the National Environmental Policy Act of 1969, agencies shall:

(a) identify their existing programs and plans that give them the authority to offer assistance to communities involved in river conservation and community health and revitalization;

(b) to the extent practicable and permitted by law and regulation, refocus programs, grants, and technical assistance to provide support for communities adjacent to American Heritage Rivers;

(c) identify all technical tools, including those developed for purposes other than river conservation,

that can be applied to river protection, restoration, and community revitalization;

(d) provide access to existing scientific data and information to the extent permitted by law and consistent with the agencies mission and resources;

(e) cooperate with State, local, and tribal governments and communities with respect to their activities that take place in, or affect the area around, an American Heritage River;

(f) commit to a policy, as set forth in section 1(j) of this order, in making decisions affecting the quality of an American Heritage River;

(g) select from among all the agencies a single individual called the "River Navigator," for each river that is designated an American Heritage River, with whom the communities can communicate goals and needs and who will facilitate community-agency interchange;

(h) allow public access to the river, for agencies with facilities along American Heritage Rivers, to the extent practicable and consistent with their mission; and

(i) cooperate, as appropriate, with communities on projects that protect or preserve stretches of the river that are on Federal property or adjacent to a Federal facility.

Sec. 5. *Responsibilities of the Committee and the Council on Environmental Quality.* The CEQ shall serve as Executive Agent for the Committee, and the CEQ and the Committee shall ensure the implementation of the policies and purposes of this initiative.

Sec. 6. *Definition.* For the purposes of this order, Executive agency means any agency on the Committee and such other agency as may be designated by the President.

Sec. 7. *Judicial Review.* This order does not create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

/s/ William J. Clinton

THE WHITE HOUSE,
September 11, 1997.